Nantucket Fish Company; K. Leslie Glenn, Trustee in Bankruptcy of Nantucket Fish Company *and* Hotel Employees and Restaurant Employees and Bartenders Union, Local 28, a/w Hotel Employees and Restaurant Employees International Union, AFL–CIO. Case 32–CA–11928

December 11, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS OVIATT AND RAUDABAUGH

On March 25, 1992, Administrative Law Judge Jerrold H. Shapiro issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions only to the extent consistent with this Decision and Order.

The issue presented is whether the Respondent granted voluntary recognition to the Union. The judge found that the Respondent had voluntarily recognized the Union on June 27, 1991,[2] and that, by subsequently refusing on July 2 to bargain with the Union, the Respondent violated the Act. The Respondent contends, however, that its actions cannot be construed as acknowledging the Union's majority status or voluntarily extending recognition to the Union as the exclusive representative of its employees. For the reasons discussed below, we find merit to the Respondent's contentions.

Respondent K. Leslie Glenn is the trustee in bankruptcy for the Respondent Nantucket Fish Company, which owns and operates a restaurant located in Cricket, California.[3] Glenn, in her capacity as trustee in bankruptcy, has been responsible for the management and operation of the Company's business. On June 27, Glenn and the Respondent's attorney, David Lowell, attended a fee application hearing held in connection with Nantucket Fish Company's bankruptcy.

Union Representative James Dupont credibly testified that just prior to the beginning of the bankruptcy case hearing, he went over to Glenn, introduced himself, and asked her if she had received his fax.[4] When Glenn answered ''no,'' he informed her that the Union represented the majority of Respondent's employees. He then asked her to look at the papers he was handing her, adding that he wanted to meet and talk with her. Glenn, however, stating ''not now we're in court,'' refused to accept the papers, which included the employees' petition and the Union's written demand for recognition. Dupont returned to where he had been sitting with several of the Respondent's employees. At the urging of these employees, Dupont returned to where Glenn was seated and again proffered the papers to Glenn. This time Glenn took the papers and while she was waiting for her case to be called, she read the employees' petition and the Union's letter demanding recognition and bargaining.[5] Glenn also showed them to Lowell.

At the conclusion of the hearing, Dupont and the employees met with Glenn and Lowell in a conference room across the hall from the courtroom. Dupont began the meeting by stating, ''as you have seen, we represent a majority of the employees at the Nantucket Fish Company and we want to set up dates to bargain and discuss the issues.'' Dupont then asked Glenn ''if she had any problem with that.'' Glenn responded, ''fine, we'll meet with you, but we've got a lot of things going on today and we'll call you later this afternoon.'' When Dupont asked that meeting dates be scheduled, Lowell stated that he was not sure whether he or another person in his firm who handles labor relations would handle the matter but that he would get back to Dupont by the end of the day. Dupont agreed to that procedure, the parties exchanged cards, shook hands, and departed. That afternoon Lowell tried to reach Dupont but was unsuccessful. Thereafter, Dupont tried on June 28 and July 1 to reach Lowell by phone at his office without success. Therefore, on July 2, Dupont sent a letter to Glenn in which he thanked her for recognizing the Union and suggested some dates for bargaining. Meanwhile, also on July 2, but before Glenn had received Dupont's letter, she sent him a letter in which she declined to recognize the Union and expressed a good-faith doubt as to the Union's majority status. After Glenn had received Dupont's letter, she sent him another letter rejecting the Union's demand for recognition, expressing doubt as to the Union's majority and suggesting that the Union file a representation petition with the Board. Instead, the Union filed an unfair labor practice charge.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] All dates are 1991 unless indicated otherwise.

[3] The judge found, and the Respondent conceded, that for purposes of this proceeding, Glenn, in her role as trustee in bankruptcy, is the alter ego of Nantucket Fish Company. Throughout this decision they are collectively referred to as the Respondent.

[4] Dupont had faxed Glenn a copy of an employee petition demanding recognition of the Union and a copy of the Union's like demand. Because Dupont had the wrong fax number, Glenn did not receive these copies until July 8.

[5] The judge discredited Glenn's testimony that she did not examine the documents presented to her by Dupont.

In concluding that the Respondent recognized the Union, the judge relied on the sequence of events as set forth above to establish that the Respondent inspected the evidence of the Union's claim of majority status and that the Respondent not only acknowledged the Union's majority but also recognized the Union as the majority representative of the Respondent's employees. We disagree.

The Board will find that an employer has voluntarily recognized a union if the employer has agreed to recognize the union on proof of majority status and the union's majority status has been demonstrated. The key to voluntary recognition in that circumstance is the ''commitment of the employer to bargain upon some demonstrable showing of majority.''[6] A commitment to enter into negotiations with the union is also an implicit recognition of the union. Once the original commitment to bargain is made, the employer cannot unilaterally withdraw its recognition and to do so is a violation of the Act.[7] Whether or not the employer has voluntarily granted recognition is a question of fact.

The judge's determination that the Respondent voluntarily recognized the Union essentially turns on Glenn's response to Dupont's assertions in the meeting that occurred after the fee application hearing. After Dupont stated that the Union represented a majority and wanted to set up bargaining dates and asked if she ''had any problem with that,'' Glenn responded, ''fine, we'll meet with you, but we've got a lot of things going on today and we'll call you later this afternoon.'' The judge found that Glenn's response ''unequivocally committed herself to meeting with the Union for purposes of collective bargaining'' and that the response ''constitutes an implicit recognition of the Union's status as the employees' collective bargaining representative.''

Contrary to the judge, we find that Glenn's response does not constitute an unequivocal agreement to recognize and bargain with the Union, because it is subject to more than one interpretation. Admittedly, one interpretation is that Glenn agreed to enter into negotiations with the Union and that the Respondent would contact the Union later. But an equally reasonable interpretation is that Glenn merely acknowledged what Dupont was saying and that Glenn agreed to meet with Dupont to discuss the issues raised by Dupont, including whether the Union represented a majority of the employees and whether the Respondent would recognize and bargain with the Union. At best, therefore, we have an ambiguous response that is susceptible to different, reasonable, but irreconcilable, interpretations.

Nor is this ambiguity removed by other evidence that would tend to confirm the judge's interpretation of Glenn's response, and, therefore, his finding that the Respondent voluntarily recognized the Union. Indeed, that response stands alone as a possible indication of recognition. During the very brief conversations in the courtroom between Glenn and Dupont, Glenn did not so much as even hint that the Respondent would recognize the Union. And in the short meeting in the conference room, she did not use the words ''recognize'' or ''recognition,'' and did not comment on the employee petition or acknowledge that the Union had presented proof of majority support. To hold in these circumstances that Glenn's brief response, ''fine we'll meet with you,'' must be interpreted as an express recognition of the Union would be to ignore the realities of the situation and impose a bargaining relationship on the parties in the absence of a clear, express, and unequivocal statement of recognition.[8] Accordingly, we shall dismiss the complaint.

ORDER

The complaint is dismissed.

[6] For example, if an employer agrees to recognize a union on proof of its majority status through a card check, it is bound by the card check results and violates the Act if it thereafter refuses to recognize the union or withdraws recognition. See *Green Briar Nursing Home*, 201 NLRB 503 (1973); see also *Research Management Corp.*, 302 NLRB 627, 643 (1991).

[7] *Jerr-Dan Corp.*, 237 NLRB 302, 303 (1978), enfd. 601 F.2d 575 (3d Cir. 1979).

[8] We find *Richmond Toyota*, 287 NLRB 130 (1987), relied on by the judge, distinguishable. There, the Board found that the employer recognized the union and then unlawfully disavowed that recognition. The Board found that recognition occurred after the employer's vice president requested proof of the union's majority status, examined the authorization cards, verified the employees' signatures, and then stated that she was unavailable on the requested date, but that her husband, the employer's president, would handle the negotiations and contact the union representative. In the instant case, those affirmative actions on the part of the Respondent are lacking. Chairman Stephens dissented in *Richmond Toyota* because he found the employer's statements in that case equivocal.

Gary M. Connaughton, for the General Counsel.
Robert K. Carrol and *Stephen C. Tedesco (Littler, Mendelson, Fastiff & Tichy)*, for the Respondent.

DECISION

STATEMENT OF THE CASE

JERROLD H. SHAPIRO, Administrative Law Judge. This proceeding in which a hearing was held on December 9, 1991, is based on an unfair labor practice charge and an amended charge filed by Hotel Employees and Restaurant Employees and Bartenders Union, Local 28, a/w Hotel Employees and Restaurant Employees International Union, AFL–CIO (Union) on July 9 and August 21, 1991, respectively, and a complaint issued on August 22, 1991, by the Regional Director for Region 32 of the National Labor Relations Board (Board), on behalf of the Board's General Counsel, alleging that the Nantucket Fish Company and K. Leslie Glenn, Trustee in Bankruptcy of Nantucket Fish Company (Respondent), violated Section 8(a)(1) and (5) of the National Labor Relations Act (Act).

The complaint alleges, in substance, that on June 27, 1991, Respondent voluntarily recognized the Union as the exclusive bargaining representative of an appropriate unit of the Nantucket Fish Company's employees and that, in violation of Section 8(a)(5) and (1) of the Act, on or about July 2 and 5, 1991, Respondent withdrew recognition from the Union. In its answer to the complaint, Respondent denied the commission of the alleged unfair labor practice.

On the entire record,[1] from my observation of the demeanor of the witnesses, and having considered the posthearing briefs filed by the General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. THE BUSINESS OF THE EMPLOYER

Respondent Nantucket Fish Company is a California corporation engaged in the operation of a restaurant in Crockett, California. In the course and conduct of the restaurant's operation during a 12-month period material to this case, the Nantucket Fish Company derived gross revenues in excess of $500,000 and purchased and received goods or services valued in excess of $5000 which originated outside of the State of California, or purchased goods valued in excess of $5000 from employers who meet any of the Board's jurisdictional standards.

Since late November 1990, K. Leslie Glenn has been the court-appointed trustee in *In re: Nantucket Fish Co.*, Case 4-90-00664 J 3. That case, a proceeding under Chapter 11 of the Bankruptcy code, is pending before the United States Bankruptcy Court for the Northern District of California. Glenn has been specifically authorized by the court to manage and operate the business of the Nantucket Fish Company, the debtor in the bankruptcy proceeding. During the time material to this case Glenn has in fact managed and operated the Nantucket Fish Company in her capacity as trustee. Respondent concedes, and I find, for purposes of this case, that Glenn in her role as trustee in bankruptcy of the Nantucket Fish Company is the alter ego of the Nantucket Fish Company.

Respondent admits, and I find, that the Respondent is now, and has been at all times material, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *The Evidence*

Respondent Nantucket Fish Company owns a restaurant located in Crockett, California. Respondent Glenn was appointed by the United States Bankruptcy Court in November 1990 to be a Chapter 11 trustee of the estate of the Nantucket Fish Company, and since then Glenn, in her capacity as trustee in bankruptcy, has been responsible for the management and operation of the company's business.

Glenn, a certified public accountant, is self-employed by her own firm, Glenn & Associates, which specializes in litigation support in the areas involving bankruptcy and commercial law. Glenn has substantial business experience in the areas of accounting, tax, finance, commercial lending, and loan workouts. Glenn has no experience or background in matters involving employment and labor law.

Glenn retained the law firm of Murphy, Weir & Butler to represent her as the trustee in the bankruptcy proceeding. It is a law firm which specializes in corporate reorganization and commercial lending. The retention agreement between the law firm and Glenn states the law firm was retained to advise and represent Glenn in her capacity as Chapter 11 trustee for the Nantucket Fish Company. In describing the services the law firm was contracting to perform for Glenn, the retention agreement, among other things, states:

> We will not be responsible for advising you within the areas of taxation, labor securities, or other specialties of law not within the scope of our commercial law practice.

Attorney David Lowell is an associate attorney employed by Murphy, Weir & Butler. He specializes primarily on matters involving bankrupt employers, the restructuring of troubled loans, and the financing of troubled real estate projects. He further testified he personally has had no experience whatsoever in the field of labor law and has given no advice on labor law matters. In addition, the tenor of his testimony, taken as a whole, is that since labor law is not one of the specialties of the law firm of Murphy, Weir & Butler, the firm does not offer advice to its clients about labor-management matters. However, Attorney Lowell's statements made to Judge Edward D. Jellen on June 27, 1991,[2] during the fee application proceeding held before the judge, infra, indicate that Murphy, Weir & Butler employ attorneys who are qualified to offer advice on labor-management matters. The transcript of the June 27 proceeding shows that Attorney Lowell informed Judge Jellen that Glenn had changed the employees' existing system of sharing customers' tips, which Glenn had felt was an unfair system, by instituting a new and more equitable system of pooling tips, and Attorney Lowell assured the judge that prior to implementing the new system of tip pooling that the law firm that Lowell was employed by had done a considerable amount of legal research regarding the legality of an employer-enforced tip pooling arrangement and had concluded that that type of an arrangement was legal. Attorney Lowell's exact words to the judge were: ''Our office did a considerable amount of legal research regarding the legality of an employer-enforced tip-pooling arrangement and we concluded that yes, in fact, that type of arrangement was enforceable.''

On June 27, Glenn and Attorney Lowell attended a fee application hearing held in connection with Nantucket Fish Company's bankruptcy. The purpose of the hearing was for the professionals employed in the bankruptcy case to apply for their fees, which, if approved by the court, would be paid from the estate. Among those who attended the hearing were

[1] The transcript erroneously has me stating to Respondent's counsel: ''I may come back and hit you over the head like—with a baseball bat'' (Tr. p. 149, LL. 6 and 7). This should read, ''it may come back and hit you over the head like—with a baseball bat.''

[2] All dates hereinafter, unless specified otherwise, refer to 1991.

former Nantucket Fish Company employee Charlotte Woodiel-Mraz, current employees Kelly O'Malley and Monica Potter, and a representative from the Union, James Dupont, who was employed by the Union's parent organization as an organizer and was assigned to the Union as its staff director.

Prior to June 27, employee O'Malley had faxed to Dupont a copy of a petition dated June 20, 1990, signed and dated by O'Malley and 38 other employees of the Nantucket Fish Company. The petition, hereinafter for the sake of convenience referred to as the employees' petition, read as follows:

> We, the undersigned, are employees of Nantucket Fish Co. in Crockett, CA.
>
> We demand that the Nantucket Fish Co. or the legal representative thereof recognize the [Union], as the sole collective bargaining agent for all employees engaged in the handling, preparation and service of food and beverages at the Nantucket Fish Co. in Crockett, CA.
>
> We want Union Representation.

On June 26, using what he thought was Glenn's fax number, Dupont faxed to Glenn a copy of the employees' petition and a copy of a letter dated June 26 addressed to Glenn and signed by Dupont, on the Union's stationery. The letter, which for the sake of convenience is referred to hereinafter as the Union's written demand for recognition and bargaining, reads as follows:

> [The Union] hereby demands recognition of representation for the employees at the Nantucket Restaurant. We represent a majority of the employees at this location.
>
> Please call us as soon as possible to set-up a date to begin negotiations. Also, federal labor law requires that wages, hours and working conditions be frozen unless negotiated with the Union. It is an Unfair Labor Practice to change any of these items without negotiating with us.
>
> Feel free to call either Jim Dupont or Corinne Comer at 893-3181 if you have any questions.

O'Malley, however, had given Dupont an incorrect fax number for Glenn's business and, as a result, it was not until July 8 that Glenn received the faxed copies of the employees' petition and the Union's written demand for recognition and bargaining.

It is undisputed that on June 27, immediately before Judge Jellen commenced to hear the bankruptcy cases calendared for that morning, Dupont went to where Glenn was seated in the courtroom and handed her the original of the employees' petition, which employee O'Malley had brought to the court with her that morning, and also handed Glenn the original of the Union's written demand for recognition and bargaining. In dispute is what occurred when Dupont gave her those documents.

Dupont, whom I credit, testified as follows: he informed Glenn his name was Jim Dupont, that he was with the Hotel Restaurant Employees Union and asked if she had received his fax and, when Glenn answered ''no,'' he informed her the Union represented the majority of the Nantucket Fish Company's employees and asked Glenn to look at the papers he was handing her and stated they wanted to meet and talk with Glenn; Glenn did not take the papers, instead she stated, ''not now, we're in court''; Dupont responded by stating that ''we'd like to meet with you and discuss this,'' and asked whether they could meet with Glenn after the hearing concluded; Glenn answered ''yes''; Dupont then returned to where he was seated with employees Woodiel-Mraz, O'Malley and Potter; the employees indicated to Dupont that they were upset because he had not given Glenn the employees' petition and the Union's written demand for recognition and bargaining; Dupont, at their insistence, returned to where Glenn was seated and handed these papers to Glenn and asked her to look at or review them before they met; and, this time Glenn took the papers.[3]

As described above, it is undisputed that Union Representative Dupont gave Glenn the employees' petition and the Union's written demand for recognition and bargaining. There is a dispute, however, whether during the time material either Glenn or Attorney Lowell ever received these documents. Glenn and Lowell testified that when Lowell joined Glenn in the courtroom on June 27, Glenn did not give those documents to Lowell, and Glenn further testified she never read the documents. Their testimony may be summarized as follows.

Glenn testified that when Dupont handed her the employees' petition and the Union's written demand for recognition and bargaining, she observed the top part of the stationery of the Union's written demand for recognition and bargaining read, ''Hotel Employees Restaurant Employees'' and also observed the document was addressed to ''Leslie Glenn & Associates.'' She testified that otherwise she had no idea what the documents stated and did not read either of the documents since court was about to start. She also testified that when Attorney Lowell returned to his seat, from talking to the court reporter, Glenn stated to him, ''check this out'' and held out the documents for Attorney Lowell to take, but at this point the judge entered the courtroom and Lowell, motioning with his hand, waved the papers away and told Glenn, ''don't worry about that,'' and Glenn placed the documents in a compartment located in the back part of her briefcase.

Attorney Lowell testified that when he rejoined Glenn, after having spoken to the court reporter, Glenn told him ''she'd been accosted by a union organizer or a union representative . . . who tried to give her some papers.'' Attorney Lowell further testified that at this point the judge entered the courtroom and that he [Lowell] stated to Glenn ''not now'' or ''we'll take care of that later.'' Lowell also testified that when Glenn spoke to him, as far as Lowell could recall, she had nothing in her hands. Later during the hearing when it was suggested to Attorney Lowell that his aforesaid testimony that Glenn had told him that a union rep-

[3] Glenn testified that Dupont, whom, she did not know, but whom she had observed sitting in the back of the courtroom with employees of the Nantucket Fish Company, came to where she was seated and stated, ''I'm Jim Dupont, I'd like to give you these.'' Glenn further testified she accepted the papers which he handed to her, but at the same time stated to him, ''excuse me, we're about the start a hearing here,'' and that Dupont asked, ''can I speak to you later?,'' and Glenn replied, ''yes . . . I'll talk to you later,'' and Dupont left. I credited Dupont's testimony, rather than Glenn's, because Dupont's testimonial demeanor was excellent, whereas Glenn's was poor.

resentative had ''tried'' to give her some papers, indicating that Glenn had not accepted them, Attorney Lowell changed his aforesaid testimony. He now testified that time had dulled his memory of the event and he did in fact recall Glenn say something to the effect of ''he gave me something'' and further testified he thought Glenn tried to show him something, but he was not paying attention to Glenn because he was ''trying to get focused on the hearing'' and told Glenn not to bother him and stated to her that they would deal with that matter after the hearing.

The hearing of the first case on Judge Jellen's calendar on June 27 commenced at 9:30 a.m. and it was not until shortly after l0 a.m. that the proceeding involving the fee application for the Nantucket Fish Company's bankruptcy commenced. During this interval of approximately 30-plus minutes, Glenn sat in the courtroom and listened to what was going on in connection with the other cases. She testified that during this period her briefcase remained under her chair unopened and she did not take the few minutes it would have taken for her to read the documents which Union Representative Dupont had handed to her immediately before the judge's entrance. When asked why she did not look at those documents during the 30-plus minutes she was sitting and listening to the other bankruptcy cases which did not concern her, she testified: ''The main reason I didn't look at the papers was because on my way to the courtroom I had not checked the calendar, and I did not know what order we were on and thus we could have been called at anytime.'' Then, when asked why, after it had become apparent to her that her fee application was not first on the calendar, that during the next 25-plus minutes she did not take the few minutes it would have taken to remove Dupont's papers from her briefcase and look at them, she testified:

> Quite frankly . . . I was not interested in what this gentleman that I did not know had put in front of me, because I was concerned about the fact that there were creditors in the courtroom, and this was my fee application hearing. I was not concerned with an unidentified or an unknown man who had given me something and a couple of employees in the back row. I was concerned with the creditors. I represent the creditors.

Immediately after the fee application hearing involving the Nantucket Fish Company, which concluded at approximately at l0:30 a.m, Union Representative Dupont and employees Woodiel-Mraz, Potter and O'Malley, followed Attorney Lowell and Glenn out of the courtroom into a conference room located across the hall from the courtroom. After this meeting, which is discussed infra, which ended at approximately 11 a.m., Glenn and Attorney Lowell filed some papers with the bankruptcy court and then, after doing some personal errands, Glenn went to a baseball game which started early in the afternoon. Glenn testified that when she went to the baseball game she placed her briefcase in the trunk compartment of her automobile. She further testified that from 9:30 a.m. on June 27, when she placed the documents Dupont had given her into her briefcase, until the time she went to the baseball game, the documents remained in the briefcase and that she did not look at them. She further testified that when the baseball game ended, late that afternoon, she by then had completely forgotten about the documents Dupont had given her. She testified she completely forgot about them because: ''I had been at the [baseball] game. I was not concerned about this issue.'' Thus, when Glenn went back to her office on June 27, after the baseball game, she testified she did not remove the papers from the briefcase and look at them because she had forgotten they were there.

Glenn testified that on Thursday, June 27, when she finished work for the day, she left her briefcase in her office where it stayed for the next 3 days, unopened, because she testified she took those 3 days off from work and did not visit the office.

Monday, July 1, when Glenn returned to work, she testified when she entered her office at approximately 9:30 a.m., she immediately received a telephone call from Attorney Lowell, before she had a chance to open her briefcase, and Attorney Lowell informed her that his law firm did not handle labor matters and recommended she telephone Attorney Stephen Tedesco. Glenn testified this was all Attorney Lowell said to her. This testimony was given, without objection, while Glenn was on the witness stand during direct examination. However, during cross-examination, when counsel for the General Counsel attempted to cross-examine Glenn about this conversation, both Glenn and Respondent's counsel objected; they invoked the attorney-client privilege. I agreed, over General Counsel's objection, that the conversation was privileged and precluded the General Counsel from questioning Glenn about the conversation, but struck Glenn's above-described testimony concerning her July 1 conversation with Attorney Lowell which had been given during direct examination.

Glenn testified that, acting on Attorney Lowell's advice, she telephoned Attorney Tedesco on July 1 at approximately l0 a.m. and that after speaking with Attorney Tedesco she removed from her briefcase the papers which Union Representative Dupont had given to her on June 27. She testified she removed them in a manner that made it impossible for her to look at them and that, holding them face down, she faxed them to Attorney Tedesco and placed the originals in an envelope addressed to him. She testified that based upon the advice of Attorney Tedesco she did not look at the papers.

In summation, as described in detail supra, Glenn testified she never read the employees' petition or the Union's written demand for recognition and bargaining, even though she received those documents from Dupont. For the reasons below, I reject her testimony and find that on the morning of June 27, shortly after having received those documents from Dupont, Glenn read them.

Glenn's and Attorney Lowell's above-described testimony was contradicted by Dupont's testimony. He testified that when he returned to his seat in the courtroom on June 27, after giving Glenn the employees' petition and the Union's written demand for recognition and bargaining, he observed Glenn, who was seated four or five rows in front of him, looking at the documents he had just left with her and testified he also observed that, when Attorney Lowell joined her, Glenn handed the documents to Lowell, who ''thumbed'' through them.[4] Dupont impressed me as an honest witness.

[4] Dupont's above-described testimony was corroborated by Woodiel-Mraz' testimony. Woodiel-Mraz has filed charges with governmental agencies accusing Glenn of having wrongfully terminated her employment with the Nantucket Fish Company and she is obviously antagonistic toward Glenn on account of her belief that Glenn

In observing his testimonial demeanor—his tone of voice and the way he looked and acted while on the witness stand—I concluded he was a sincere and conscientious witness when he testified about the events that occurred on the morning of June 27, whereas the testimonial demeanor of Glenn and Attorney Lowell was poor.

Moreover, the probabilities inherent in the circumstances and Glenn's poor testimonial demeanor warrant the inference that Glenn reviewed the documents given to her by Dupont and did so before her June 27 meeting with Dupont in the court house conference room. As described supra, Glenn had ample time to review the documents during the approximately 30 minutes she was sitting in court and listening to other bankruptcy cases which did not concern the Nantucket Fish Company's bankruptcy. Glenn's testimony that she did not use a few minutes of this time to look at the papers which Dupont had previously given to her, does not ring true because: Glenn had been given the documents by a man whom she had observed sitting with employees of the Nantucket Fish Company in the back of the courtroom; by her own admission Glenn had determined from the face of one of the documents that the matter involved a union; Glenn, according to the testimony of Attorney Lowell, believed that the man who gave her the documents was a union representative; and, Glenn testified, ''*I felt it was important* that a man that I did not know had accosted me at the bankruptcy court and shoved a bunch of papers in my face'' (Tr. p. 338). In view of these circumstances, I find it inconceivable that during the 30 minutes in which Glenn did nothing but listen to matters which did not concern her fee application or the Nantucket Fish Company's bankruptcy, that she did not take the few minutes of time needed to review the documents which Dupont handed to her and which she admittedly had told Dupont she would discuss with him later that day at the conclusion of the hearing involving her fee application. I considered the above-described explanation offered by Glenn for not looking at the documents during this 30-minute interval, but rejected it because when she gave this testimony, as well as when she testified about the other events of June 27, I received the impression from her testimonial demeanor that she was not an honest witness, but was tailoring her testimony to fit Respondent's theory of the case, regardless of what actually occurred. It is for all of these reasons that I reject Glenn's testimony that prior to her June 27 meeting with Dupont in the courthouse conference room, she did not read the employees' petition or the Union's written demand for recognition and bargaining, and further find that the truth is the exact opposite of her testimony.

There is an additional circumstance which warrants the inference that Glenn testified falsely when she testified the employees' petition and the Union's written demand for recognition and bargaining were not removed from her briefcase from 9:30 a.m. on Thursday, June 27, until the morning of Monday, July 1, and were not inspected by herself and Attorney Lowell prior to the time she placed them in her briefcase. Thus, it is undisputed that by the time Dupont concluded his June 27 conference room meeting with Glenn and Attorney Lowell, discussed infra, Attorney Lowell by at least that time knew Dupont was the ''union representative'' or the ''union organizer'' who Glenn had told him had given her the documents. As a matter of fact, according to one of the versions given by Lowell of the June 27 conference room meeting, infra, Dupont told Lowell that he wanted to discuss with Respondent the documents he had given to Glenn prior to the fee application hearing, and Lowell, according to Lowell's testimony, responded by telling Dupont that he was ignorant about labor law and because of this would have to talk with other people in his office to figure out what to do and that someone would call Dupont later. Lowell further testified he unsuccessfully tried to reach Dupont by telephone later that day for the purpose of advising him that Glenn would have to employ a labor law specialist who would contact Dupont. The inference being that Attorney Lowell had in fact consulted with others in his office and after considering the matter it was decided that Glenn should employ a labor law specialist.

I find it unbelievable that Attorney Lowell would have made such a decision without first having reviewed the documents which Lowell knew Union Representative Dupont had given to Glenn and which, according to Lowell's testimony, Dupont had told Lowell he wanted to talk to Respondent about. I cannot imagine Attorney Lowell seeking advice or giving advice to Glenn on this matter without first reviewing those documents.[5] Obviously, if he had not already been shown the documents by Glenn, for Attorney Lowell to have reviewed them, Glenn would have had to remove them from her briefcase to show them to him and presumably would have reviewed them with him. It is for this additional reason, I find Glenn's testimony of her ignorance of what was contained in the documents which Dupont handed to her on June 27 to have been a fabrication.

On June 27, when Judge Jellen shortly after l0 a.m. reached the Nantucket Fish Company case, before he addressed the applications for fees involved in that case, he informed Attorney Lowell and Glenn he had received a letter signed by ''quite a few'' of the Nantucket Fish Company's employees and that the substance of the letter indicated to him there was a ''substantial morale problem'' among the employees. Attorney Lowell replied he had not received a copy of the letter. The judge gave him a copy and instructed him to reply to the employees within 10 days.

It is also undisputed, as set forth in the official transcript of the June 27 Nantucket Fish Company fee application hearing, that Union representative Dupont entered an appearance during that proceeding and, after introducing himself to the court, informed Judge Jellen:

> The employees of the Nantucket Fish Company have spoken to our union and asked us to represent them. Most of the employees who signed the letter to you have also signed a petition asking us to be the bargaining agent for them in future dealings with management. We've given Ms. Glenn the petition this morning and

has treated her unfairly. Thus there is a danger that Woodiel-Mraz' bias against Glenn has influenced her testimony, and I have considered this. However, Woodiel-Mraz impressed me demeanorwise as a sincere and conscientious witness, when, on both direct and cross-examination, she testified in effect that she observed both Glenn and Attorney Lowell look at the documents which Dupont had given to Glenn.

[5] Attorney Lowell testified that on June 27 when he returned to his courtroom seat that he did not inspect the documents Dupont had given to Glenn. He was not questioned specifically as to whether Glenn ever showed him those documents subsequently on June 27.

> asked for some dates to begin bargaining. And I just wanted to—from my meetings with the workers, well, the morale is just going steadily down. There seems to be a huge amount of anxiety about the future. They—I mean, the people don't know what is happening. I think some of the things that have happened this morning clarify what is happening, but people don't know, and just in this situation in general, there's a great deal of anxiety. And it's been, it sounds to me, exacerbated by that lack of information. And so I just wanted to let you know that that's—that is also in the works with the employees, and we intend to meet with Ms. Glenn afterwards.

Immediately after the June 27 fee application hearing, Dupont, with employees Woodiel-Mraz and Potter, followed Attorney Lowell and Glenn into a conference room located across the hallway from the courtroom. It was a very small room, approximately 8-by-12 feet, with a table and the chairs which took up most of the space. Attorney Lowell was standing beside Glenn, therefore, during the conversation which followed, whatever was said between Dupont and Glenn or between Dupont and Lowell should have been heard by Lowell and Glenn and for that matter, due to the small size of the room, by everyone in the room unless for some reason their attention was distracted.

On entering the conference room Dupont spoke to Glenn. He introduced himself as Jim Dupont from the Union and stated, ''as you've seen we represent a majority of the employees at the Nantucket Fish Company and we want to set up dates to bargain and discuss the issues.'' He asked if Glenn, ''had a problem with that?'' Glenn replied, ''fine, we'll meet with you, but we've got a lot of things going on today and we'll call you later this afternoon.'' Dupont explained to Glenn that they had several things to discuss with her including the employees' tips and the minimum wage and that they wanted to smooth out the process of the sale of the restaurant by letting the employees know what was happening. Glenn replied by stating she thought the employees were ungrateful about what she had done for them, that she had made the restaurant solvent and had paid the bills and taxes. Dupont stated it was not his intention to cause any problems, but he just wanted to sit down with Glenn and work things out and let all of the employees know what was happening. Woodiel-Mraz, at this point, initiated a brief confrontation with Glenn about her termination. When Woodiel-Mraz and Glenn concluded their verbal exchange, Dupont asked that meeting dates be scheduled. Attorney Lowell, who was standing next to Glenn, replied he was not sure whether he or the person in his firm who handles labor relations would handle the matter, but stated he would telephone Dupont that afternoon. Employee Potter urged that Dupont get a meeting date from Respondent immediately. Attorney Lowell repeated he would get back to Dupont by the end of the day. Dupont stated that was agreeable with him and he exchanged business cards with Attorney Lowell and they shook hands, and, as Dupont left, Attorney Lowell remarked to him, ''this might have been the best thing to happen.''

The above description of what occurred during the June 27 conference room meeting is based on Dupont's testimony, which conflicts in significant respects with Attorney Lowell's and Glenn's testimony. Their testimony about this meeting is summarized as follows.

Glenn testified when Dupont walked into the conference room with Woodiel-Mraz and Potter, that Potter leaned across the conference room table and told Glenn, ''we don't want the restaurant closed'' and Glenn replied, ''that's still an option,'' and that this ended their exchange. Glenn testified the next thing she observed was Dupont offering Attorney Lowell a card, but testified she did not hear Dupont say anything to Lowell. She further testified she heard Lowell say to Dupont, ''I don't handle these matters. We'll have someone get back to you or someone will get back to you,'' and observed Dupont accept Attorney Lowell's card and heard Dupont say ''okay,'' at which point Woodiel-Mraz initiated a confrontation with her about Woodiel-Mraz' termination and when that ended, Dupont, Potter, and Woodiel-Mraz left the conference room. Glenn further testified that at no time did Dupont speak to Glenn nor Glenn speak to Dupont.

Attorney Lowell testified that during the conference room meeting, Dupont spoke only to him and said nothing to Glenn. During direct examination, when asked to describe his conversation with Dupont, Attorney Lowell testified: ''Dupont wanted to talk about the stuff that he'd given Leslie before the hearing. I told him that I did not know anything about labor law, and that I did not deal with these matters [and] I believe I said that I'd have to go back and talk with people in my office to figure out what to do, and that someone would call him,'' and further testified that Dupont responded by giving Lowell his business card and Lowell reciprocated. When asked if Dupont said he represented a majority of the employees, Lowell testified, ''no he did not say that, that's something that would have jumped out in my mind . . . he did not use the words 'I represent.''' Attorney Lowell also testified he does not remember Dupont asking to set up meetings.

Later when Attorney Lowell was again asked to describe his conversation with Dupont, this time he gave the following testimony: ''I don't remember [Dupont's] exact words, but it was clear he wanted to talk about the stuff he'd given Leslie before the hearing. . . . I'm saying I don't remember the exact words he used, but he made it clear that he wanted to form a union, and he wanted to talk about forming a union. And that's when I said, 'I don't know anything about labor law, we'll have to have someone get back to you about it who does.'''

Still later, during cross-examination, counsel for the General Counsel told Lowell not to be concerned about his inability to remember the exact words of the conversation, but to give his best recollection of it. In response, Lowell testified that on June 27 he had just come out of a ''bitterly contested hearing'' and that because of this, testified, ''I wasn't focusing that much on, you know, exactly what Dupont was saying,'' but testified that ''I remember the gist of what [Dupont] said which is that . . . he wanted to talk about forming a union,'' and further testified that ''as soon as it became clear that's what [Dupont] wanted to talk about . . . I knew it was something that I didn't know about and I told him . . . that I couldn't do that.'' Lowell further testified that he was sure that ''the import'' of what Dupont said to him was that Dupont ''wanted to do something prospectively, namely, to convince people to join the union.''

Woodiel-Mraz and Potter testified, as witnesses for the General Counsel, about the June 27 conference room meeting. The General Counsel, in support of Dupont's account of that meeting, points to those portions of their testimony which corroborate his testimony. Respondent points to those portions of their testimony which do not corroborate his testimony, especially their failure to corroborate his testimony that, in response to his demand for recognition and bargaining, Glenn stated ''fine we'll meet with you.'' The General Counsel contends that while Woodiel-Mraz and Potter did not specifically corroborate that part of Dupont's testimony, their testimony is not inconsistent with his testimony in that respect.

I have not relied on Woodiel-Mraz' or Potter's testimony because I am of the opinion that they were not reliable witnesses when they testified about what was said during the portion of the June 27 conference room meeting relevant to this proceeding, because time had dulled Potter's memory, and Woodiel-Mraz's attention was not focused on what was being said, but was focused virtually entirely upon what she intended to say to Glenn about the grievance she had with Glenn over her termination.

In Woodiel-Mraz' case, in her affidavit given to the Board on July 25, during the Board's investigation of the Union's charge, Woodiel-Mraz stated, in pertinent part, ''Dupont opened the conversation and made some statements, which I did not pay much attention to since I was preoccupied with what I wanted to say to Glenn.'' Woodiel-Mraz testified that the aforesaid statement in her affidavit ''meant that at the time that I was listening to Dupont, I also had in my mind if I was going to be able to negotiate with Glenn to get my job back,'' and further testified that getting her job back with the Nantucket Fish Company was the most important thing in her mind at the time.

In Potter's case, she testified in effect that there were portions of the conversation which took place in the conference room which she was unable to recall because of the passage of time. I note that Potter did not submit an affidavit to the Board in this case until 2 days before the instant unfair labor practice hearing and was not questioned by the Board about the events pertinent to this case until 1 week before the hearing. She testified that if she had sat down immediately after the June 27 meeting and written down what occurred that she would have been able to now remember more of what had been said on June 27, but that she had not given any thought about what had been said at the June 27 meeting until she was contacted by the counsel for the General Counsel 1 week before the trial—approximately 5 months after the event—therefore she testified her memory of what was said was incomplete.

I reject Attorney Lowell's and Glenn's above-described testimony and credit Dupont's, because in observing Dupont's testimonial demeanor I concluded he was a sincere and conscientious witness when he testified about what transpired on June 27, whereas the testimonial demeanor of Attorney Lowell and Glenn was poor.

Moreover, the logic of the circumstances confirms that Dupont addressed his remarks to Glenn and not to Attorney Lowell, as Attorney Lowell and Glenn testified, and confirms that Dupont informed Glenn, ''as you've seen we represent a majority of the employees at the Nantucket Fish Company and we want to set up dates to bargain and discuss the issues,'' rather than stating that he wanted to talk about convincing the employees to form or join the Union, as Attorney Lowell testified. In fact Attorney Lowell's and Glenn's aforesaid testimony is so inconsistent with the realities of the situation, that it constitutes further proof that their testimony about the events of June 27 is not credible. These conclusions are based on the following considerations.

Glenn was responsible for the management and operation of the Nantucket Fish Company. Dupont knew this, therefore *he addressed to Glenn* the Union's written demand for recognition and bargaining. It is undisputed that on June 27, immediately before the start of the bankruptcy hearing, Dupont *attempted to speak to Glenn* about the employees' petition and the Union's written demand for recognition and bargaining. It is undisputed that because a bankruptcy hearing was about to start, Glenn declined to talk with Dupont, but *Glenn agreed to talk with him* when Respondent's fee application hearing concluded. It is also undisputed that during the June 27 fee application hearing, Dupont told the judge that at the conclusion of the hearing h*e intended to meet with Glenn* in connection with his request that Glenn bargain with the Union. These circumstances, viewed in their totality, demonstrate the inherent improbability of Attorney Lowell's and Glenn's testimony that Dupont did not speak to Glenn when they met in the conference room at the conclusion of the June 27 fee application hearing.

Prior to June 27 Dupont possessed a petition signed by 39 of the Nantucket Fish Company's employees stating they wanted union representation and wanted the company to recognize the Union as their collective-bargaining representative. Also, prior to June 27, Dupont had written a letter to Glenn which stated the Union represented a majority of the Nantucket Fish Company's employees and demanded Respondent recognize and bargain with the Union as the employees' collective bargaining agent and asked Glenn to contact him as soon as possible to schedule dates for the negotiations. Subsequently, on June 27, prior to the start of the fee application hearing, Dupont personally gave the employees' petition and the Union's written demand for recognition and bargaining to Glenn and it is undisputed that Glenn stated she would meet with Dupont later that day following the close of the fee application hearing. It is also undisputed that during the fee application hearing, just prior to his conference room meeting with Attorney Lowell and Glenn, Dupont informed the judge presiding over the fee application hearing that the employees of the Nantucket Fish Company had signed a petition asking the Union to represent them in their dealings with management and that he had given a copy of that petition to Glenn that morning and had asked for some dates to begin bargaining and that he intended to meet with Glenn that day at the conclusion of the fee application hearing. These circumstances, viewed in their totality, demonstrate the inherent improbability of Attorney Lowell's testimony that when Dupont met in the conference room with Attorney Lowell and Glenn immediately after the fee application hearing that Dupont stated to Lowell that he wanted to talk to Respondent about convincing the employees to form or join the Union.

The testimony of Attorney Lowell concerning what occurred at the June 27 conference room meeting is further discredited by the fact that he gave contradictory testimony on a matter of significance. As described supra, Attorney Lowell

first testified that at the June 27 conference room meeting Dupont stated he wanted ''to talk about the stuff that he'd given [Glenn] before the hearing.'' Subsequently, as described supra, Attorney Lowell changed this testimony and now testified Dupont stated he wanted ''to talk about forming a union,'' ''convince people to join the Union.'' As described supra, the documents which Dupont prior to the hearing had given Glenn could not under any stretch of the imagination have been interpreted as a request to organize the Respondent's employees. Rather, the documents unambiguously informed Respondent the Union had already organized the employees, that it represented a majority of the employees, and demanded Respondent recognize and bargain with the Union.

In crediting Dupont's and rejecting Attorney Lowell's and Glenn's accounts of what took place on June 27, I considered Respondent's contention that ''it is simply not credible to believe the testimony presented by the General Counsel that Lowell, who admittedly had no knowledge about labor law matters, would agree to set a date to bargain.'' Initially, I note that this is not a situation where Glenn, upon being confronted with the request for recognition and bargaining, turned the matter over to Attorney Lowell. Instead, as I have found supra, Attorney Lowell was faced with a fait accompli, for when confronted with Dupont's request for recognition and bargaining, Glenn, without asking for Lowell's advice, committed herself to recognizing and bargaining with the Union. It was only after Glenn committed herself to this course of conduct, that Attorney Lowell involved himself, when Dupont requested dates for bargaining sessions. The issue at that point was not whether or not Respondent would recognize and bargain with the Union, but was who, for Respondent, would conduct the negotiations. Under the circumstances, it is not incredible that after hearing Glenn commit herself to recognizing and bargaining with the Union, that Attorney Lowell reacted by indicating that with respect to the actual contract negotiations he was not sure who would be handling the negotiations and would get back to the Union.[6] As for Attorney Lowell's subsequent advice to Glenn to employ Attorney Tedesco because he was employed by a law firm which specializes in the field of labor-management relations, Respondent offered no evidence as to Attorney Lowell's purpose in giving Glenn this advice. It is not inconceivable that Attorney Lowell advised Glenn to employ a law firm that specializes in labor-management relations for the purpose of determining whether Respondent, under the circumstances, was legally obligated to recognize and bargain with the Union and, if so, to handle those negotiations on behalf of the Respondent.

[6] Dupont's testimony that Attorney Lowell indicated that someone from his firm would handle the negotiations is not inherently incredible inasmuch, as I have noted supra, the transcript of the June 27 fee application hearing indicates that Attorney Lowell's law firm does employ persons who are qualified to give advice on labor-management matters and who had previously given such advice to Glenn about the pooling of employees' tips. Therefore, although the retention agreement between Glenn and the law firm provides that the law firm will not be responsible for advising Glenn about those specialties of law not within the scope of the firm's commercial law practice, the firm in the past has apparently chosen to advise Glenn about at least one labor-management relation matter which was not within the scope of the firm's usual commercial law practice.

On the afternoon of June 27 Attorney Lowell telephoned Dupont's office. Dupont was not there, so he left a message that he had called and asked Dupont to return his call.[7]

Dupont telephoned Attorney Lowell's office on Friday, June 28, and again on Monday, July 1, but was informed he was not there, so he left messages he had called. When, by July 1, Dupont had been unable to reach Attorney Lowell, he prepared a letter, addressed to Glenn, with a copy to Attorney Lowell, which was mailed July 2 and received by Glenn on July 3. This letter reads as follows:

> Thank you for recognizing Hotel Employees & Restaurant Employees Local 28 as the bargaining representative of the Nantucket Fish Co. in Crockett, CA. Your lawyer Mr. David Lowell has attempt to contact me, I assume to set a date to begin bargaining. Since I am very hard to reach I am giving you some dates to bargain. We are available on: July 9, 10, or 11 (all day) or if you would like to meet early the evenings of July 2, 3, or 5.
>
> Please call me at 893-3181 to set the date.

On July 2, acting on the advice of Attorney Tedesco, Glenn sent Dupont the following letter:

> This is in response to your demand for recognition of the Union as a representative of employees of the Nantucket Fish Company. The Company has a good faith doubt that the Union represents an uncoerced majority of the employees in an appropriate unit. Therefore, we decline to recognize the Union as the exclusive representative of these employees.

The language of the letter was authored by Attorney Tedesco.

Upon receipt of the letter Dupont sent to her on July 2, Glenn, upon the advice of Attorney Tedesco, responded by letter dated July 5, which Dupont received on July 8, and which read as follows:

> I am writing to correct the misstatements in your undated letter which I received on July 3, 1991. I did not recognize the union as the exclusive bargaining representative of the employees of the Nantucket Fish Company in Crockett, California, nor has anyone else associated with the restaurant done so. Frankly, your letter only further confirms my good faith doubt that the union represents an uncoerced majority of the employees in an appropriate bargaining unit. If you think you truly represent a majority of the employees, we suggest you petition the National Labor Relations Board for an election and allow the employees the opportunity to decide this issue for themselves.

On July 9, on behalf of the Union, Dupont filed the unfair labor practice charge in this case.

[7] Attorney Lowell testified his purpose in telephoning Dupont was to inform him that Glenn would need to hire a special labor counsel and that the special labor counsel would get back to Dupont.

B. *Discussion and Conclusions*

The complaint alleges that on June 27 Respondent voluntarily recognized the Union as the exclusive bargaining representative of Respondent's employees employed in an appropriate unit and further alleges that, in violation of Section 8(a)(1) and (5) of the Act, on July 2 and 5 Respondent withdrew its recognition.

The pertinent facts

During the time material K. Leslie Glenn, a certified public accountant, was the court-appointed trustee in *In re: Nantucket Fish Co.*, Case 4-90-00664 J 3. That case, a proceeding under Chapter 11 of the Bankruptcy Code, was pending before the United States Bankruptcy Court for the Northern District of California. Glenn was authorized by the court to manage and operate the business of the Nantucket Fish Company, the debtor in the bankruptcy proceeding, and during the time material was responsible for the management and the operation of the Nantucket Fish Company, and, as the trustee in bankruptcy, was the alter ego of that company.

A hearing was scheduled by the bankruptcy court in *In re: Nantucket Fish Co.* for the morning of June 27 to consider the fee applications filed by Glenn and the other professionals employed by the court in that case. On June 27, at approximately 9:30 a.m., the court began hearing the first case on its calendar and did not reach the Nantucket Fish Company fee application matter until shortly after 10 a.m.

Immediately before the court on June 27 commenced hearing the first case on its calendar, Union Representative James Dupont, who was seated in the courtroom, went to where Glenn was seated and handed her two documents:[8] a petition dated June 20 which was signed and dated by 39 of the Nantucket Fish Company's employees and which stated that the signers wanted union representation and wanted the Nantucket Fish Company or its legal representative to recognize the Union as the employees' collective-bargaining representative; the second document, a letter on the Union's stationery, signed by Dupont and addressed to Glenn, stated the Union represented a majority of the Nantucket Fish Company's employees, demanded that Glenn recognize the Union as the representative of the employees, and asked Glenn to phone the Union as soon as possible to schedule a date to begin collective-bargaining negotiations. Dupont informed Glenn that his name was Jim Dupont, that he was with the Union and asked if she had received his fax and, when Glenn answered ''no,'' told her that the Union represented the majority of the Nantucket Fish Company's employees and asked if Glenn would look at the papers he was handing her and stated he wanted to meet and talk with Glenn. Glenn stated she would meet with Dupont later that day immediately after the conclusion of the fee application hearing. Glenn initially declined to accept the papers being handed to her by Dupont, but eventually took them when Dupont asked that she look at or review them before they met.

During the first 30 minutes in which the court was in session on June 27—9:30 a.m. to 10 a.m.—it dealt with matters other than the case involving the Nantucket Fish Company. These were matters that did not concern Glenn. During this interval Glenn read what was contained in the employees' petition and the Union's written demand for recognition and bargaining; the papers previously handed to her by Dupont. Previously, she had shown them to Attorney Lowell.

Later that morning, at the conclusion of the Nantucket Fish Company fee application hearing, Glenn and Dupont met in a conference room across the hall from the courtroom. Dupont began the meeting by stating, ''as you've seen we represent a majority of the employees at the Nantucket Fish Company and we want to set up dates to bargain and discuss the issues.'' He then asked whether Glenn had a problem with that. Glenn answered, ''fine, we'll meet with you, but we've got a lot of things going on today and we'll call you later this afternoon.'' Dupont stated he wanted to discuss several things including the employees' tips and their minimum wage, and that he wanted to smooth the process of the sale of the restaurant for the employees by letting them know what was happening. The meeting ended with Dupont asking Glenn to agree to specific meeting dates and with Attorney Lowell, who had been standing next to Glenn, replying that he was not sure whether he or the person in his firm who handles labor relations would be handling the matter, and that he would telephone Dupont later that afternoon.

During the afternoon of June 27 Attorney Lowell telephoned Dupont's office, but was unable to reach Dupont because he was out of the office, so Lowell left a message for Dupont to return his call. Attorney Lowell's purpose in telephoning Dupont was to inform him that Glenn would need to employ a special labor counsel and that the special labor counsel would get back to Dupont.

On Friday, June 28, and on Monday, July 1, Dupont tried unsuccessfully to reach Attorney Lowell by phone at Lowell's office, so on July 1 he prepared a letter addressed to Glenn, with a copy to Lowell, which was mailed on July 2 and which, in substance, thanks Glenn ''for recognizing [the Union] as the bargaining representative of Nantucket Fish Co.,'' and informs Glenn that Attorney Lowell had tried to contact Dupont to set a date to begin bargaining, but that since Dupont was very hard to reach he was giving Glenn some dates on which he was available for negotiations.

On July 2, prior to receiving Dupont's above-described July 2 letter, Glenn, acting upon the advice of Attorney Tedesco, the attorney whom Attorney Lowell had recommended that Glenn retain, wrote Dupont a letter. Glenn's July 2 letter, in substance, states that Glenn declines to recognize the Union as the bargaining representative of the employees of the Nantucket Fish Company because the Nantucket Fish Company ''has a good faith doubt that the Union represents an uncoerced majority of the employees in an appropriate unit.''

Subsequently, on receipt of Dupont's July 2 letter, Glenn, acting upon the advice of Attorney Tedesco, on July 5 wrote Dupont another letter. Glenn's July 5 letter to Dupont states, in substance, that contrary to Dupont's assertion that Glenn had recognized the Union, Glenn had not recognized the Union as the employees' bargaining representative, and further states that Dupont's letter ''only further confirms my good faith doubt that the Union represents an uncoerced majority of the employees in an appropriate bargaining unit,'' and Glenn ends this letter by suggesting that the Union petition the Board for an election.

[8] Previously, on June 26, Dupont faxed these documents to what he thought was Glenn's place of business, but the faxed copies were not received by Glenn until July 8 because Dupont had used the wrong fax number.

On receipt of Glenn's July 5 letter, Dupont immediately filed the unfair labor practice charge in the instant case.

The applicable principles of law

The basic principles governing this case are succinctly stated by the Seventh Circuit in *NLRB v. Lyon & Ryan Ford*, 647 F.2d 745, 750–751 (1981) (brackets in original):

> An employer's voluntary recognition of a majority union remains ''a favored element of national labor policy.'' *NLRB v. Broadmoor Lumber Co.*, 578 F.2d 238, 241 (9th Cir. 1978). An employer who has not committed unfair labor practices and has not recognized a union has the right to require an election regardless of the union's showing of majority status. But once the employer recognizes the union, no matter how informally, he loses the right to require an election. *NLRB v. Brown & Connolly, Inc.*, 593 F.2d 1373 (1st Cir. 1979); *NLRB v. Gogin*, 575 F.2d 596 (7th Cir. 1978). The essence of voluntary recognition is the ''commitment of the employer to bargain upon some demonstrable showing of majority [status] . . . . Once that commitment [is] made, [the employer cannot] unilaterally withdraw its recognition and to do so [is] a violation of the Act.'' *Jerr-Dan Corp.*, 237 NLRB 302-303 (1978), enforced, 601 F.2d 575 (3d Cir. 1979). *Accord, Brown & Connolly*, 593 F.2d at 1374; *NLRB v. A. Lasaponara & Sons, Inc.*, 541 F.2d 992 (2d Cir. 1976), cert. denied, 430 U.S. 914 (1977); *Toltec Metals, Inc. v. NLRB*, 490 F.2d 1122 (3d Cir. 1974).

It is also settled that when an employer voluntarily recognizes a union, but subsequently withdraws recognition before bargaining for a reasonable time, the General Counsel makes out a prima facie case of an unlawful refusal to bargain when he has established these facts. There is, under settled law, no affirmative duty on the General Counsel to establish the union's majority in fact, as of the time of the recognition. Rather, as the Board has emphasized, ''the burden is on the respondent, the party seeking to escape the bargaining obligation normally arising from voluntary recognition, to adduce affirmative evidence proving the union's lack of majority at the time of recognition.'' *Royal Coach Lines*, 282 NLRB 1037–1037 (1987), and cases cited therein. The reason for the presumption of majority status based upon voluntary recognition is that an employer's recognition of a bargaining representative of less than a majority is an unfair labor practice. *NLRB v. Roger's I.G.A.*, 605 F.2d 1164, 1165 (10th Cir. 1979) (citing *NLRB v. Cayuga Crushed Stone*, 474 F.2d 1380, 1383 (2d Cir. 1973)). It is presumed that ''employers normally will not knowingly violate the law.'' *Roger's I.G.A.*, 605 F.2d at 1165 (quoting *NLRB v. Tahoe-Nugget, Inc.*, 584 F.2d 293, 303 (9th Cir. 1978)). This presumption is well grounded in the reality of labor relations. For, as stated by the court in *NLRB v. Cayuga Crushed Stone*, 474 F.2d 1380, 1382–1383 (2d Cir. 1973), it is unlikely that an employer would ''freely enter [] into an agreement recognizing the status of the [union] as a bargaining representative'' without an election ''if there was any question of lack of majority support.''

As the court in *Lyon & Ryan Ford*, supra, has indicated, the Board in *Jerr-Dan Corp.*, 237 NLRB 302 (1978), held that the key to the voluntary establishment of a bargaining relationship is the ''commitment of the employer to bargain upon some demonstrable showing of majority.'' In *Jerr-Dan*, the respondent-employer did not expressly state it recognized the union, rather the Board's conclusion that the respondent-employer had extended recognition flowed from the respondent-employer's implicit recognition of the union, based on the respondent-employer's commitment to enter into negotiations with the union. Id. at 303 and fn. 6.

Conclusions

As stated by Respondent in its posthearing brief, ''[t]he only issue to be decided in this case is whether Respondent voluntarily granted recognition [to the Union] on June 27.'' I am of the view that the credible evidence, set forth above, establishes that on June 27 the following occurred: the Union claimed majority status; the Respondent inspected the evidence of the Union's claimed majority status; the Respondent acknowledged the Union's majority status; and, recognized the Union as the majority representative of Respondent's employees. These findings are based on the following considerations.

On June 27 Union Representative Dupont verbally informed Glenn that the Union represented a majority of Respondent's employees and asked her to look at the papers he was handing to her, and handed Glenn two documents: a petition signed by 39 of Respondent's employees which stated they wanted the Union to represent them and wanted the Respondent to recognize the Union as their bargaining representative; and, a letter signed by Dupont which stated the Union represented a majority of Respondent's employees, demanded that Glenn recognize the Union as the employees' representative, and asked Glenn to contact the Union to schedule a date to begin collective-bargaining negotiations. Glenn, after she read the employees' petition and the Union's written demand for recognition and bargaining, met less than 2 hours later with Dupont, who, began their meeting by stating, ''as you've seen we represent a majority of the employees of the Nantucket Fish Company and we want to set up dates to bargain and discuss the issues,'' and asked if Glenn had ''a problem with that.'' Glenn did not refuse to meet and bargain with the Union either on general grounds or by questioning the Union's majority status. Instead, when Dupont asked if she had a problem with agreeing to dates to meet with the Union to bargain and to discuss the issues, she unequivocally committed herself to meeting with the Union for purposes of collective bargaining by replying, ''*fine we'll meet with you*, but we've got a lot of things going on today and we'll call you later this afternoon.''

Glenn's response, ''fine we'll meet with you,'' when viewed in context, constitutes an implicit recognition of the Union's status as the employees' collective-bargaining representative. Not only was it expressed in response to Dupont's unambiguous verbal request that Glenn agree to meet with the Union for purposes of bargaining, but less than 2 hours previously, Dupont had given Glenn a petition signed by 39 of the employees and a letter signed by Dupont, on behalf of the Union, which demanded that Glenn recognize the Union as the majority representative of Respondent's employees and asked Glenn to contact Dupont to schedule dates for collective-bargaining negotiations. Under the circumstances, when Dupont shortly thereafter spoke to

Glenn and, after referring to the employees' petition and to Dupont's letter demanding recognition and bargaining, asked if Glenn had a problem in agreeing to meet for bargaining and to discuss the issues with the Union, which represented a majority of the Respondent's employees, and Glenn answered, ''fine we'll meet with you,'' Glenn could have had no doubt she had agreed to meet with the Union for the purpose of collective-bargaining negotiations, and had implicitly recognized the Union as the employees' collective-bargaining representative.

In concluding Respondent recognized the Union on June 27, I considered Respondent's contention that the evidence I have relied on, does not establish Respondent recognized the Union because: the record does not indicate whether the signatures on the employees' petition were actually those of Respondent's employees, and there is no proof of the signatures' authenticity or that a majority of the employees employed by Respondent signed the petition; there was no evidence that Glenn said anything which can be construed as an acknowledgement that the Union represented a majority of Respondent's employees or that the issue of whether the Union's majority status was ever discussed by the parties; and, Glenn's statement to Dupont, ''fine, we'll met with you,'' was ambiguous and there is no evidence that Glenn, by saying this, understood the meeting was for the purpose of negotiating a collective-bargaining agreement. The last of these contentions lacks merit for the reason previously stated, and the remainder lack merit for the reasons below.

As set forth supra, an employer who voluntarily recognizes a union and subsequently desires to escape its bargaining obligation on the ground that the Union did not represent a majority of the unit employees at the time of recognition, has the burden of adducing evidence proving the union's lack of majority at the time of recognition. *Royal Coach Lines*, 282 NLRB 1037–1037 (1987), and cases cited therein. In the instant case, although Glenn in her July 2 letter to the Union, questioned whether the Union represented an uncoerced majority of Respondent's employees, in the instant proceeding Respondent made no effort to establish the Union's lack of majority status.

It is also settled that the law does not require employers to verify claims of majority status before granting recognition nor allow them to escape their bargaining obligation if they have recognized a union without verification of the union's majority status. See, for example, *Dollar Rent-A-Car*, 236 NLRB 206, 212–213 (1978) (employer's grant of recognition was binding even though the employer did not ask to see the cards); *Moisi & Sons Trucking*, 197 NLRB 198, 199 (1972) (employer's grant of recognition was binding despite employer's assertion that the union had refused to produce cards). In any event, in the instant case, Glenn acknowledged the Union's majority status by consenting to future negotiations with the Union after she had examined the employees' petition. See *Richmond Toyota*, 287 NLRB 130, 131 (1987).

Lastly, I reject Respondent's contention that this is a case where Respondent's representatives, ''not well versed in labor law,'' were caught by surprise by the Union in the middle of a bankruptcy hearing and because they were surprised and preoccupied with the bankruptcy hearing that they ''put off making a decision on the demand to bargain for several days.''[9] As I have found supra, Glenn did not ''put off making a decision on the demand to bargain for several days,'' instead, after examining the employees' petition and the Union's written demand for recognition and bargaining, she responded to Union Representative Dupont's verbal request that she meet and bargain with the Union as the representative of a majority of the employees, by agreeing to meet and bargain with the Union. That Glenn and Attorney Lowell were inexperienced in the intricacies of the law, insofar as it relates to Respondent's obligation to recognize and bargain with the Union, does not constitute a defense for Respondent's subsequent repudiation of its voluntary recognition of the Union. See *Toltec Metals v. NLRB*, 490 F.2d 1122, 1124–1125 (3d Cir. 1974); *NLRB v. Brown & Connolly, Inc.*, 593 F.2d 1373, 1374 (1st Cir. 1979); *Gregory Chevrolet*, 258 NLRB 233, 240 (1981), see also *Snow & Sons v. NLRB*, 308 F.2d 687, 692 (9th Cir. 1962).

Having found that on June 27, 1991, Respondent voluntarily recognized the Union as the exclusive representative of its employees in an appropriate unit and, thereafter since July 2, 1991, has refused to bargain with the Union, I conclude that Respondent has violated Section 8(a)(1) and (5) of the Act.

CONCLUSIONS OF LAW

1. Respondent Nantucket Fish Company is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Respondent K. Leslie Glenn, during the time material, was the trustee in Bankruptcy of the Nantucket Fish Company, and its alter ego.

3. All employees of the Nantucket Fish Company employed at its Crockett, California facility engaged in or connected with the preparation, handling and serving of food and beverages, excluding office clerical employees, supervisors, and guards as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. The Union is a labor organization within the meaning of Section 2(5) of the Act.

5. By refusing on or about July 2, 1991, to bargain with the Union as the exclusive representative of the employees in the appropriate unit, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act.

6. The aforesaid unfair labor practice affects commerce within the meaning of Section 2(6) and (7) of the Act.

[Recommended Order omitted from publication.

[9] In its posthearing brief Respondent also appears to suggest that the Union's June 27 conduct constitutes ''an orchestrated encounter whose sole object [was] to trick the employer into saying the 'magic word'.'' There is no evidence that this was the case. As indicated supra, prior to June 27, on June 26 the Union faxed a copy of the employees' petition and its written demand for recognition and bargaining to Glenn, which, unknown to the Union, was not received by Glenn. Thus, the Union did not intend to surprise Glenn on June 27 with its demand for recognition and bargaining and there is no evidence that the circumstances under which Union Representative Dupont spoke to Glenn on June 27 were reasonably calculated to ''trick'' or otherwise coerce Glenn into agreeing to recognize the Union.